United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by:
Thomas P. O'Sullivan

76-1232

In The

United States Court of Appeals

For the Second Circuit

Bp/s

UNITED STATES OF AMERICA,

Appellee,

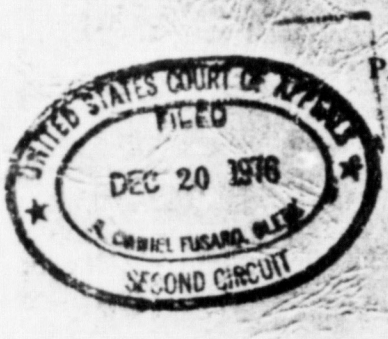
against

W. BALDWIN DROMS,

Appellant.

Appeal From The United States District Court
For The Northern District of New York

BRIEF FOR APPELLEE



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In The

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UNITED STATES OF AMERICA,

Appellee,

against

W. BALDWIN DROMS,

Appellant.

Appeal From The United States District Court
For The Northern District of New York

BRIEF FOR APPELLEE

Issues Presented

1. Was the evidence sufficient for conviction?

2. Did the Court err in denying the motion for judgment of acquittal?

3. Should the State Law apply to the extent of obstructing Federal law enforcement?

4. Was the Court's instruction as to submitting both alleged materially false items to the jury for consideration together in error?

Statement of the Case

On April 23, 1975, a Federal Grand Jury sitting in Albany, in the Northern District of New York, returned Criminal Indictment Number 75-CR-47, a true bill, charging the appellant, W. Baldwin Droms, with a one count violation of Title 26, Section 7206(1) of the United States Code, making it an offense against the United States for any person to willfully make and subscribe any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter.

In particular the Indictment alleged that the appellant did willfully and knowingly make and subscribe a Statement of Financial Condition and other Information, on Internal Revenue Service Form 433, which was verified by a written declaration that it was made under the penalties of perjury, and was filed with the Internal Revenue Service, which appellant did not believe to be true and correct as to every material matter.

The Indictment further specified that the said Form 433 was false with respect to two material matters in that it was represented on such form that the appellant's income for the 1968 tax year was $6,600 and further represented that the appellant had not disposed of an asset, which at the time of disposition, had a cost in excess of $500.00, for less than the full value of such asset, during the time period contemplated by the said Statement of Financial Condition — Form 433, and the accompanying Offer In Compromise — Form 656.

Whereas, as alleged and further specified in the Indictment, the appellant, there and then well knew and believed that his income for the 1968 tax year was substantially more than the $6,600 reported on said Form 433, and whereas, appellant further well knew and believed, that during the period of time contemplated by the said Statement of Financial Condition — Form 433, and accompanying Offer In Compromise — Form

656, he had acquired an asset, namely, a corporation known as Prestige Realty of the Capital District Corporation, on or about November 1, 1968, at a cost of $10,000.00, and immediately thereafter on or about November 2, 1968, he disposed of said asset, which at that time had a value in excess of $500.00, by transferring all title to said asset to another for less than its full value. (Appellee's App. pp. 1 and 2).

Appellant's pre-trial motions, included a Motion To Dismiss the Indictment, (Appellee's App. p. 6), contending only that the discrepancy with respect to the charge of understatement of income appeared to be an inadvertent mistake on the part of appellant or the preparer of the form in question, without advancing any argument as to why dismissal of the Indictment should be required with respect to the charge that the appellant had failed to report the disposal of an asset as required by the form in question.

In addition to discovery motions under Rule 16 of the Federal Rules of Criminal Procedure, motion was also made for a bill of particulars under Rule 7, which included among its demands, the request to know the manner in which the asset was disposed, and the request to know to whom the asset was transferred, as well as to know the amount received for the asset and the value of the assets. (Appellee's App. p. 11).

The Government's responding papers, with respect to the motion to dismiss, point out the absence of any argument in regard to the failure to report the disposal of an asset as required by the document in question. (Appellee's App. p. 13).

In response to the demand for a bill of particulars the government alleged that the appellant had acquired the corporation known as Prestige Realty of the Capital District Corporation, at a cost of $10,000, on November 1, 1968, and that on or about November 2, 1968, he transferred all of the stock he had just acquired in said corporation, which was 100% of the corporation's stock, to one Martha Spoor for less than its full value,

alleged to be at least its cost, and that the value received, did not exceed $5,000 but that the actual value received was unknown. (Appellee's App. p. 13).

Trial commenced on November 20, 1975, before the Hon. James T. Foley in Albany, New York.

After a five day trial, the jury returned a verdict of guilty on November 26, 1975. Appellant moved to set aside the verdict and for judgment of acquittal which were denied.

On January 19, 1976, the appellant appeared, with counsel, before the Hon. James T. Foley in Albany, for sentencing. Imposition of sentence was suspended and the appellant was placed on probation for a period of one year, and fined the sum of $1,000 to be paid on or before February 23, 1976.

Notice of appeal was filed on February 2, 1976, and the appellant takes this appeal to contest the sufficiency of the conviction, with respect to whether the government met its burden of proof as to the charge that the appellant had disposed of an asset; whether the Court erred in ruling that the government's proof as to the disposal of an asset was sufficient to allow the jury to decide the issue; whether the Court should have ruled as a matter of law that the asset had not been transferred or disposed of by the appellant; and whether the Court erred in its charge to the jury, with respect to not instructing the jury to separately decide appellant's guilt or innocence on each of the alleged material false statements, but rather allowed the jury to consider both statements together so long as they all found that the same statement was false.

Statement of Facts

On April 4, 1968, the appellant, W. BALDWIN DROMS, was held to be the responsible officer of a defunct corporation, Baldwin Droms Incorporated, and was assessed a 100% penalty for failure of the corporation to pay over the employees withholding taxes for a period of time ending in June of 1966, which resulted in a tax liability of $19,247.49, which was thereafter reduced to $18,202.66 (Transcript pp. 77-78). Testimony of Lawrence Reis, Accounting Chief of the Office Branch of the Internal Revenue Service in Albany, Transcript pp. 667-670, Government Exhibit 1, (Appellee's Appendix p. 22).

Prior to the date of that tax assessment in February or March of 1967, the appellant, entered into an oral agreement with Mr. Marion Kolakowski, under which, Mr. Kolakowski agreed to turn over the operation of a realty sales corporation owned jointly by him and his wife, known as Prestige Realty of the Capital District Corporation, to the appellant, W. Baldwin Droms, giving Droms complete control of the corporation's management, and arranging to have the appellant the only corporate agent authorized to draw funds from the corporation's bank account, and it was further agreed that thereafter the appellant would pay Mr. Kolakowski the sum of $50.00 for every house sold until the sum of $10,000.00 had been paid, at which time the stock of the corporation would be transferred to the appellant giving him title to the corporation. (Transcript pp. 338-353), Direct Testimony of Marion Kolakowski, Transcript pp. 391-396, Direct Testimony of Francis Johnson, representative of the Mohawk National Bank, Government Trial Exhibit No. 16 Corporate resolutions naming W. Baldwin Droms as the only agent authorized to withdraw funds from the corporate bank account. Appellee's Appendix pp. 88-89, Transcript pp. 670-673, Direct Testimony of W. Baldwin Droms.

The first of these $50.00 payments pursuant to the agreement was made on March 15, 1967 and the last payment was

completed on May 9, 1968, completing the full payment of $10,000. (Transcript pp. 347-349, Kolakowski — Direct, Government Trial Exhibit 15, Record of Payments on the Business kept by Kolakowski, Appellee's Appendix pp. 83-87. The Kolakowski payment record corresponds to disbursements from the corporate account reflected in the Corporation's Disbursement Books, Government Trial Exhibits 10 and 11, as reflected by the testimony of the appellant, Transcript pp. 717-718, Appellee's Appendix pp. 208-209).

In July of 1968, the appellant went to the accounting firm of Louis Lombardi in Schenectady, New York, to arrange to have the outstanding tax matter resolved. Mr. Daniel Ertel, an employee of the firm, a former Revenue Officer of the Internal Revenue Service, who was then a Certified Public Accountant, was assigned to handle the matter and initially met with the appellant on July 25, 1968, for some two hours, to discuss his financial situation in order to prepare an Offer in Compromise to be submitted to the Internal Revenue Service to settle his tax liability. With the information supplied by the appellant, Mr. Ertel prepared the first Offer In Compromise on Internal Revenue Service Form 656 and the required accompanying Statement of Financial Condition and Other Information on Internal Revenue Service Form 433, which was dated July 29, 1968, by Mr. Ertel to indicate that the Form 433 reflected the appellant's financial condition as of that date, and was thereafter submitted to the Internal Revenue Service in August of 1968. (Transcript pp. 247-259, Direct Testimony of Daniel Ertel, Transcript pp. 675-679, Droms — Direct, Government Trial Exhibit 2, the first Offer In Compromise and Financial Statement, Appellee's Appendix pp. 24-33).

Mr. Ertel testified that he went over each page of the Form 433 with the appellant, (Transcript p. 254), and specifically stated that he would have made inquiry under Item 26 of Form 433 which asks the taxpayer to indicate whether he has any

assets or interests in assets, to which the appellant responded, "No", indicating that he had no interest in any other asset. (Transcript pp. 678-679).

The testimony of Revenue Officer Clifton Atkinson established that the purpose of submitting an Offer In Compromise to compromise a tax deficiency was either to claim doubt as to the amount of the liability or to claim the inability to pay the assessment, and whenever a taxpayer submits an Offer In Compromise based upon inability to pay, he must also submit a Financial Statement on Form 433 to substantiate that he cannot pay the account. (Transcript pp. 158-159).

Mr. Atkinson further testified that the purpose of requesting the data under Items 22-A and 22-B of Form 433 was to determine the amount and sources of the taxpayer's income and to establish his actual expenses in order to determine his ability to pay the amount owed or some portion of that amount and in order to make a judgment as to whether to accept or reject the offer that was made. (Transcript pp. 182-184).

He further testified as to the purpose and meaning of Item 23 of Form 433, which asks the taxpayer to report the disposal of any asset or property with a cost or fair market value at the time of sale, transfer, exchange, gift, or other disposition, in excess of $500.00, except for full value, from the beginning of the taxable period covered by the Offer In Compromise to the present date.

He indicated that the time period contemplated by the form referred to the date the tax liability arose to the date that the offer was submitted or signed, and that assets referred to any real or personal property that costs or could be sold for more than $500.00, which was sold, transferred, exchanged, given away or otherwise disposed of for less than its value, mentioning that such things as a car, jewelry, fur coats, a boat, etcetera, if it cost or was worth more than $500.00 would have to be reported under Item 23 if disposed of for less than its value.

He further indicated that the purpose for requesting such data was to establish whether the taxpayer was trying to devoid himself of property in order to have his offer in compromise be given greater consideration, and if he had disposed of such assets it would have a bearing on the acceptance or rejection of his offer.

If the disposal of an asset were reported, additional information was required under Item 23 to determine the substance of any such disposal. The date of the transfer or disposition would establish when the federal tax lien would attach to such property and what priority it would be given with respect to liens by other creditors, and in regard to this matter, Mr. Atkinson pointed out that a statutory lien arose in favor of the government when the delinquent account arose and notice of the lien was filed with the county clerk where the taxpayer resides, and that this lien attached to any property that the taxpayer owned and that it also attached to any after-acquired property or equity in property acquired after the date of the lien.

Knowledge of the asset's fair market value was said to be important in determining whether it was worth pursuing in order to satisfy the debt, and the relationship between the taxpayer and the person to whom the asset was transferred was important since transfer to relatives were treated differently. All of these matters, as well as the difference between the consideration received and the value of the asset, were said to be important to the judgment as to whether to accept or reject the offer. (Transcript pp. 184-191).

The first Offer In Compromise and Financial Statement submitted by appellant, Government Trial Exhibit 2, was evaluated by Revenue Officer Atkinson and rejected in February of 1969. (Transcript p. 165, Atkinson Direct).

Thereafter Mr. Ertel filed a protest with the District Director of the Internal Revenue Service and was later informed that if a

new offer were filed providing more current information it would be accepted for investigation rather than be summarily rejected as had been the first ofier. (Transcript pp. 258-259).

After the making and submission of the first Offer In Compromise and Financial Statement, but prior to the rejection of that offer and prior to the making of the second Offer In Compromise and Financial Statement, all of the stock of the corporation known as Prestige Realty of the Capital District Corporation was transferred from Marion and Mary Kolakowski to W. Baldwin Droms on November 1, 1968. (Transcript pp. 352 and 365, Direct and Cross of Kolakowski). At which time a formal written agreement as to the transaction between the appellant and the Kolakowskis was prepared and executed by the parties. (Transcript pp. 372-373, Defendant's Trial Exhibit E, Appellee's Appendix pp. 108 & 109).

This written agreement designated Mr. and Mrs. Kolakowski as the sellers and W. Baldwin Droms, the appellant as the buyer, and indicated a sale of 100 shares of stock in Prestige Realty of the Capital District Corporation for consideration previously received from the buyer and further indicated that all right, title and interest in said stock was thereby assigned to the buyer.

It also provided that any claims against the corporation which accrued prior to March 1, 1967, (which is when Marion Kolakowski testified he relinquished all control of the corporation to the appellant, Transcript p. 349, would be paid by the sellers, and all claims and taxes occurring after March 1, 1967 would be paid by the corporation, specifying particularly those claims for which the sellers might be held personally liable which arose after March 1, 1967, and further provided that the corporation would pay the taxes for the fiscal year ending October 31, 1968.

To insure the sellers' protection, an escrow account of $7,000 was also provided for to be held until December 31, 1971, and designated Anthony Di Sorbo as the escrow agent. And further, provided that the sellers would resign their positions as directors and officers of the corporation on or before December 15, 1968.

The transfer of the stock to the appellant is also reflected on Government Trial Exhibits No.'s 12 and 13, which were obtained by the Internal Revenue Service Special Agent from Mr. Frank Parisi of the law firm of Parisi, DeLorenzo and Gordon who were then the representatives for Mr. Droms and the corporation known as Prestige Realty of the Capital District Corporation. (Transcript pp. 139-146). Direct of Special Agent Neil Broadbent, Government Trial Exhibits 12 and 13, Appellee's Appendix pp. 77-80).

Government exhibits 12 and 13 show the previous ownership of 50 shares each by Mr. and Mrs. Kolakowski and on the back of each is the endorsement reflecting the transfer of the shares of stock to the appellant, W. Baldwin Droms on November 1, 1968, which would be the second page of each exhibit, since copies were used, and those copies would also reflect that the copies had been made from originals in the possession of Frank Parisi and compared with the original by the Special Agent of the Internal Revenue Service on August 15, 1972.

Government Trial Exhibit 14, (Appellee's Appendix pp. 81 & 82), was also obtained at the same time and in the same manner as Government Trial Exhibits 12 and 13, from Attorney Frank Parisi, of the law firm representing appellant and Prestige Realty of the Capital District Corporation. (Transcript pp. 146-148). Government Trial Exhibit 14 is a third stock certificate record of Prestige Realty of the Capital District Corporation, and purports to be the number 3 stock certificate, which reflects the ownership of 100 shares in the corporation by W. Baldwin Droms as of November 1, 1968, and that on November 2, 1968, W. Baldwin Droms assigned and transferred the one hundred

shares of stock he owned, which was all of the corporation's stock, to Martha B. Spoor.

These records, inasmuch as they were supplied by the attorney for the firm representing both Mr. Droms and the corporation, Prestige Realty, and inasmuch as they were the only stock transfer records supplied, presumptively, therefore represented a true reflection of the ownership of the corporation as of November 2, 1968, and as of August 15, 1972.

The second Offer In Compromise and Financial Statement, submitted by the appellant in May of 1969, (Government Trial Exhibit 3, Appellee's Appendix pp. 34-44), was prepared by another employee of the Lombardi firm, a Mr. John Dennis, who was at that time a staff accountant and law clerk for the firm, and who was at the time of trial a Certified Public Accountant and an attorney-at-law. Mr. Dennis testified that he met the appellant in the early part of 1969, believed to be in February, March and/or April of 1969. (Transcript p. 301). He indicated that the appellant's tax problem was discussed at a meeting with Mr. Ertel and Mr. Lombardi at which he, Mr. Dennis, was present and that he was then assigned to prepare the second Offer In Compromise and Financial Statement. He related that after that time the appellant, Mr. Droms, was contacted and came into the firm's office where he was introduced by Mr. Ertel to Mr. Dennis, and that subsequent to that Mr. Dennis reviewed the offer and financial statement with the appellant acquiring most of the information used to complete the forms. (Transcript pp. 306-307).

Mr. Dennis testified that he could not remember the specific questions he asked and the responses made since it had been several years since the event occurred, but related that it was his normal practice when preparing an offer in compromise and financial statement to sit down with the client and review the financial statement and ask the client the specific questions that are on the form and to elicit from the client all the necessary

information. Accordingly, he related that all the data or lack thereof, with respect to income and expenses reflected on the second Form 433 was provided by the appellant or where negative or blank responses are reflected it would be because the appellant had so directed. Mr. Dennis also asserted that he would have asked Mr. Droms the specific question under Item 23 of Form 433 on Government's Trial Exhibit 3, (Appellee's Appendix p. 44), and would have explained the language to him. (Transcript pp. 307-313).

On cross examination as to the similarities between the first and second financial statement, and specifically as to why the appellant's mortgage had not reduced, Mr. Dennis indicated that the appellant had informed him, that he, the appellant, had not been making his mortgage payments. The cross-examiner then asked, that if that were true what did he attribute the $740.00 interest payment listed under Item 22-B of the form, if not to the interest on the appellant's home mortgage, to which Mr. Dennis replied that it could be for the interest on his other obligations such as the loan on his insurance. (Transcript pp. 320-321). Government Trial Exhibit 3, under Item 9B Liabilities on page 2 of Form 433, (Appellee's Appendix p. 38) also lists other obligations such as $1,000 accrued taxes and $2,000 Notes Payable, which also would be subject to interest payments, so that if the rate of interest were 2% on the insurance loan, 6% on the taxes and 9% on the notes it would equal in the aggregate the $740.00 interest payment reflected under Item 22B(2) of Form 433, Government Trial Exhibit 3, (Appellee's Appendix p. 43).

Mr. Dennis also testified on cross-examination that he did not complete the entire form but rather made a rough draft of the financial data for Mr. Ertel's review (Transcript p. 322). And again on redirect indicated that he did not type up the form that was submitted, but rather submitted his work papers to Mr. Ertel. (Transcript p. 332). Mr. Ertel in fact testified that Mr.

Dennis had prepared the second financial statement under his supervision and that he had reviewed the work done by Mr. Dennis. (Transcript p. 259).

Government Trial Exhibit 18, admitted by stipulation reflected the appellant's home mortgage payments for 1967, 1968 and 1969, which indicated that in the 1968 year the appellant had made 12 equal installments of $171.95 on his home mortgage, for a total annual payment of $2,063.40 indicating that the interest on his home mortgage would have been substantially greater than the $740.00 reported under Item 22B on Form 433, Government Trial Exhibit 3. (Transcript p. 414-415).

That would follow from the fact that the mortgage indebtedness, listed under Item 9B(4) on page 2 of the second financial statement, Government Trial Exhibit 3, (Appellee's Appendix p. 38), reflected a debt of $22,000 on a home which cost $20,000 and which had a sale value of $25,000 as reflected under Item 9A(6) of the Form 433.

Moreover, the appellant on direct testimony indicated that he had in fact borrowed on his insurance and had re-mortgaged his property at the time when his first corporation ran into financial difficulty in 1965 or 1966, thereby indicating that he would have had interest payments other than his home mortgage and that the interest on his home mortgage would have been greater than the $740.00 reported as interest under Item 22B on Form 433, Government Trial Exhibit 3, Appellee's Appendix p. 43). (Transcript pp. 677-678).

Accordingly, the $740.00 listed as interest payments under Item 22B of Form 433, Government Exhibit 3, could not have been the interest payments on the appellant's home mortgage, but would have had to be the interest paid on the other liabilities listed under Item 9B of Form 433, Government Exhibit 3, exactly as Mr. Dennis had testified to be the fact. Moreover, if

that be the fact then it would follow, as Mr. Dennis recalled in his testimony, (Transcript pp. 320-321), that the appellant had told Mr. Dennis that he had not been making any payments on his home mortgage.

Furthermore, with respect to the contention that Mr. Dennis had prepared the second financial statement by copying the first financial statement and then simply updated the income data for the 1968 year, using the W-2 form supplied by the appellant, it is clear from comparing page 7, Item 22B of the two Forms 433 in Government Exhibits 2 and 3, that the data listed with respect to automobile expenses, real estate taxes, and miscellaneous expenses, which are different on the two financial statements, could not have been obtained from Appellant's W-2 form.

Moreover, aside from the possibility that the ages listed on page one of the form might have changed, and according to Dennis he simply discussed the necessary financial data with the appellant, and this data would not appear to be material to that discussion, the appellant, in his testimony failed to state any single thing that would have or did change with respect to the financial data listed on the two financial statements.

None of the background data on page one, as to names, social security numbers, bank, etcetera, changed. Nothing on page 2 changed, except for the suggestion that the appellant's home mortgage should have reduced, and as discussed *supra*., Dennis testified the appellant told him he had not been making his mortgage payments, the truth of which is borne out by the fact that the $740.00 interest payment listed on Item 22B could not have been the interest of his home mortgage, but rather had to be the interest on his other liabilities as indicated by Mr. Dennis.

Similarly, nothing would have changed on pages 3, 4, and 5 between the time the two financial statements were made. And again page six would not have changed, except for the extent that it did change.

The only matter that would have changed would be the income data on page seven, which in fact did change, and obviously some of that data must have been obtained from the appellant, since it would not have been contained on a W-2 wage statement form.

It is noted, however, that on page seven of the second financial statement under Item 22A of Form 433 of Government Exhibit 3, subdivision 3, that the appellant does not indicate any income from a business or profession, but rather reflects that the $6,600 indicated on his W-2 statement is all the income he had for the 1968 year, whereas, on his Schedule C of his Form 1040 Income Tax Return for 1968, Government Trial Exhibit 4, (Appellee's Appendix pp. 47), the appellant reflects an additional $13,104 of commission income, from his realty sales business in addition to the salary received and reflected on his W-2 statement for that year.

And again on page 2 of his 1040 personal income tax return for 1968, in Government Exhibit 4, (Appellee's Appendix p. 46), the appellant reflects total deductions of $2,993, including $1,300 interest expense on his home mortgage, $955.00 for real estate taxes, $120.00 for general sales taxes, $208.00 for contributions, which arguably he must have discussed with the accountant who prepared that form. Note also that the schedule C also reflected business expenses of $1,350.00.

A comparison of the expenses listed on Government Exhibit 3, the second financial statement and Government Exhibit 4, the appellant's income tax return for the 1968 year, reflects that if the appellant had reported on the financial statement his actual expenses of $5,784.60, as reported on his return, rather than the $3,758.68 expenses, as reflected on the financial statement, it then becomes apparent that the contention that he would not know that his income was greater than $6,600.00 is ludicrous, since it appears that if his actual expenses were deducted from the reported income of $6,600 it would leave

only $815.40 for living expenses to support of family of six as indicated on his income tax return. (See, Government Trial Exhibit 21, Appellee's Appendix p. 90).

It is also noted on page seven of the second financial statement, Government Exhibit 3, under Item 22A(8), that the appellant did not report the sale of any asset in the previous 12 month period, and again on page 8 of the second financial statement, Government Exhibit 3, under Item 23, the appellant did not report the disposal of any asset with a cost of value in excess of $500.00, for less than the asset's value between the time his tax liability arose and the time he signed the second financial statement, nor did he report, under Item 25, of the second financial statement that he had any other asset or that he had an interest in any other asset. (Appelle's Appendix pp. 44).

As for the value of this asset other than its costs of $10,000, the corporation tax returns for Prestige Realty of the Capital District Corporation, Internal Revenue Service Form 1120, for the period beginning November 1, 1966, and ending October 31, 1967, and for the period beginning November 1, 1967 and ending October 31, 1968, Government Trial Exhibits 5 and 6, (Appellee's Appendix pp. 51-63) reflected that as of October 31, 1967, during the period when the appellant was acquiring the corporation, that the corporation had cash on hand in the amount of $12,740.21 and that its net worth was $5,987.42, and that as of October 31, 1968, the day before the stock of the corporation was transferred to appellant and two days before the corporate records reflected that he had transferred the stock to Martha Spoor, Government Exhibit 6, reflected that the corporation had cash on hand in the amount of $23,581.42, and that its net worth was $28,680.47, as testified to by Internal Revenue Service Special Agent Neil Broadbent. (Transcript pp. 603-607). See, Government Trial Exhibit 22, Appellee's Appendix p. 91.

Thereafter, the corporation's receipts and disbursements records, Government Trial Exhibits 9, 10, and 11, do not reflect any happening which would reflect any appreciable decrease in the net worth of this corporation during the applicable period up to May of 1969 or thereafter.

With respect to the appellant's knowledge that his income was more than the $6,600 reflected on his W-2 statement which was all the income he indicated to Mr. Dennis that he had, for purposes of preparing the second financial statement, the testimony of the accountant who prepared the appellant's individual tax returns for the years 1967 and 1968, Mr. Anthony DiSorbo, is illuminating.

The procedure he followed in computing appellant's income was to first determine any salary income from the corporation payroll book, and then as best he could, he would review the corporation's disbursement records, to analyze each expense item listed to determine which were corporate expenses and which were personal in nature to Mr. Droms, so as to be considered constructive receipt of income to the appellant, since the appellant was paying his personal expenses from the corporation's bank account, indicating that he recalled such expenses as college tuition payments, clothing and payments on the appellant's home mortgage. (Transcript pp. 538-539).

He testified that the appellant had been following the same practice of using the corporate account to pay his personal obligations in the 1967 year as well as in the 1968 year, and that he had discussed this matter with the appellant in April of 1968 when he prepared appellant's individual tax return for the 1967 year, and told the appellant that he would be charged with constructive receipt of income for payments out of the corporation account for his personal obligation. (Transcript pp. 564-566).

He also testified that to his recollection and review of the records that it appeared that roughly $3,000 out of the $7,200 reported as income on appellant's 1967 individual income tax return was due to constructive receipt of income. (Transcript pp. 569-570).

With respect to the contention that some of the items he construed to be income to the appellant might actually have been loans from the corporation or the employer, Mr. DiSorbo, testified that if that were so there should have been appropriate backup material in the records, such as notes, and that in fact there was no such backup material. (Transcript pp. 570-572).

Moreover, as discussed, *supra*., Kolakowski had turned over the corporate bank account to the appellant in February of 1967, and had no further dealings in the management of the corporation, except for the receipt of the $50 per house sold, pursuant to his purchase agreement with the appellant.

DiSorbo, further testified in regard to when the appellant would know the amount of this constructive income for the 1968, that he, DiSorbo, would know what this constructive commission would be when he prepared the corporation's return for the corresponding corporate fiscal year, which would be for the year ending October 31, 1968, which would be Government Exhibit 6, (Appellee's Appendix pp. 57). (Tr. pp. 553-554).

That exhibit reflects that it was prepared January 3, 1969, and signed January 7, 1969 by Marion Kolakowski in the capacity of President of the corporation. It also reflects that the corporate return was received by the Internal Revenue Service, (District Director, Albany), on January 8, 1969. Page two of that exhibit, under Schedule E — Compensation of Officers, reflects compensation for Mr. Kolakowski in the amount of $5,437.71 and compensation for Mr. Droms, the appellant, in the amount of $13,103.80.

The amount of compensation for the appellant, when rounded off, matches the amount of commission income reflected on Schedule C of his 1040 for the 1968 year, Government Exhibit 4, Appellee's Appendix pp. 47).

Defendant's Exhibit E, the written executed sales agreement, Appellee's Appendix pp. 97-98, had provided that the stock was transferred to appellant November 1, 1968, that the corporation would pay the tax for the fiscal year ending October 31, 1968, that the Kolakowskis would resign their positions as corporate officers by December 15, 1968, and that DiSorbo would be the escrow agent to insure compliance.

Accordingly, it would appear, as far as DiSorbo knew that the appellant was the sole owner and only officer of the corporation in January of 1969, and pursuant to the sales agreement he would have or should have consulted appellant with respect to the corporate return for that year, and should have provided the appellant with those records.

When questioned as to his knowledge of the corporate tax return for the period ending October 31, 1968, the appellant could not remember whether DiSorbo had provided him with a copy for his records, and also could not remember when the tax was paid, but indicated it would be months after the end of the fiscal period but not as soon as January of 1969. However, the corporate disbursement record, Government Exhibit 10, reflected that the tax for that year had been paid or that the check had been made out on January 3, 1969, but appellant could not remember seeing the return on that date. (Transcript pp. 775-778).

It would therefore appear obvious from the fact that the check was made out, by appellant, prior to the time Kolakowski signed the form, that DiSorbo, endeavoring to protect Kolakowski pursuant to the escrow agreement, took the corporate tax returns to Droms on January 3, 1969 to insure

payment of the tax, and it appears likely that, if not discussed, at least the corporate return or a copy was given to the appellant for his records at that time, since DiSorbo would know from his status as escrow agent that Kolakowski would have no further business with the corporation and that appellant was at that time the owner.

Two items from appellant's testimony suggest that there was in fact a discussion of this constructive income matter in January of 1969 when the corporate return was prepared. The appellant in fact remembers having such a discussion with DiSorbo, not in April of 1967 and not in April of 1968, but as he recalls it was about six months before April of 1969, and January being four months prior would be roughly in that area, and there does not appear to be any other occasion for DiSorbo and appellant to have had that conversation. (Transcript pp. 754-755).

The other item from appellant's testimony that would indicate that he had a discussion with DiSorbo in January of 1969 regarding the corporation income tax return is the fact he was afraid that after all those payments that Kolakowski would not turn over the stock of the corporation, (Transcript p. 719), and further testified that DiSorbo was Kolakowski's accountant and he was required to do business with him, but that when the stock was transferred over he would not thereafter do business with DiSorbo. (Transcript pp. 740-741).

Judging from that testimony it appears that the appellant did not trust either Kolakowski or DiSorbo, and in fact it appears that because he distrusted them he secured the assistance of another accountant in May of 1968, at the time the payments on the business were completed, Mr. Dominic Parisi, to advise him. (Transcript p. 739).

It therefore would seem peculiar that the appellant would not have discussed the corporate return with DiSorbo to insure

against paying taxes that may have existed from prior years, which were the sellers' responsibility, and in view of the testimony equally peculiar that he would not discuss it with Parisi, since he did not trust DiSorbo, and felt he needed the expertise of another accountant.

In any event, DiSorbo testified that the appellant would certainly know the amount of this constructive income by April 12 or 15 of 1969. (Transcript pp. 554-555). He also testified that it would be difficult for him to arrive at the figures until he had gone over all the items with the appellant. (Transcript pp. 557-558). That statement suggests that he must have gone over the corporate books with the appellant, or at least the expense data, to determine what the income would be sometime prior to April 12, 1969 when he prepared the return. It also suggests that the appellant would well know that his income was greater than $6,600 and indeed knew exactly what it was by April 12, 1969. In fact, he testified that he knew it was much more than $6,600 on April 15, 1969. (Transcript p. 758).

Mr. DiSorbo further testified that prior to testifying he had tried to reconstruct how he had computed appellant's income for the 1968 year, using the corporation disbursement records to determine appellant's constructive income from the expense records, but that since he had turned over all of his records and worksheets to Mrs. Spoor he could not be sure how he arrived at the $19,700 gross income figure reflected on the 1040 individual tax return, Government Exhibit 4.

However, based on the available records he thought he might have overstated the appellant's income by as much as $5,200 since he concluded that some of the salary income the $6,600 might also have been picked up again as constructive commission income in computing the officer's compensation.

He also testified, however, that the $50 payments to Kolakowski, which he indicated totaled $5,050 for the 1968

individual tax year should have been classified as income to the appellant, so that he, DiSorbo, also understated appellant's income. (Transcript pp. 536-539, and 559-562).

Accordingly, since the difference between the understatement, (and clearly these $50 payments from appellant to Kolakowski should have been treated as income to the appellant), and the overstatement of income, if in fact it were overstated, was only $150.00, it would not materially affect the amount of the appellant's actual income or affect what he believed to be his income.

Moreover, in view of the fact that DiSorbo did not have all the records, having given them to Mrs. Spoor for Mr. Droms, particularly the corporation's "Payroll Book" which he indicated listed the salary payments, (Transcript p. 538), it's arguable that the appellant's actual income was the $19,700 reflected on the return plus the $5,050 aggregate of the $50 payments for 1968 so that his 1968 income was $24,750.

Note in this respect that DiSorbo indicates that the income reflected on the 1040 individual return could very well have been correct, with the exception that it failed to include the $50 payments. (Transcript p. 562).

It might also be noted with respect to this matter, that appellant had the advantage of having the complete records as well as Mr. DiSorbo's worksheets, and also that appellant, had available to him at trial a Certified Public Accountant as a possible expert witness, who sat at the defense table during the trial. (Transcript p. 51).

In any event the Indictment charged that the appellant knew that his income for the 1968 year was substantially greater than that reflected on the second financial statement when he had that statement prepared and when he signed it, and that would be true whether his income was $14,000, $19,000 or $24,000.

The proof of the fact that he had such knowledge results from the fact that he had complete control of the corporation's bank account and that he used that account to pay his personal obligations. Government Trial Exhibit 17, reflected checks drawn on the corporate account to pay the school and property taxes on his personal residence in 1968 and Government Trial Exhibit 18, reflected the mortgage payments on his personal residence for the years 1967, 1968 and 1969, (Transcript pp. 414 and 415). Government Trial Exhibit 19, reflected the record of the tax payments on his personal residence for 1967, 1968, 1969 and 1970, and Government Trial Exhibit 20, reflected the tax bills on that property for the years 1967 thru 1970. (Transcript pp. 502-503).

Comparing these four exhibits with Government Trial Exhibits 10 and 11, the Corporate Disbursement records it was clearly shown that the appellant had used the corporate account for his personal obligations ever since he assumed the management of the corporation in March of 1967, and that he paid his mortgage payments and school and property taxes on his residence out of the corporate funds, which for the 1968 year amounted to more than $3,000 alone. (See Government Trial Exhibits 23 and 24 for the comparisons of checks disbursed from the corporate account and checks received by the Mortgagee and the Receiver of School and Property Taxes, Appellee's Appendix pp. 92 & 93).

It is simply not believable that anyone, let alone an experienced realtor and employer, himself, would not have known that the income reflected on his W-2 statement would not include the payments on his home mortgage and the payments for his taxes or for school tuition, and it is simply not believeable that he would not have known that these items were income to him, and accordingly when he supplies his W-2 statement to the preparer of the second financial statement he must know his

income was much greater than the $6,600 shown on his W-2 statement.

Note in this respect that appellant testified that he was told that the purpose for the new offer in compromise and financial statement was to "have another offer showing last year's income." (Transcript p. 732). Note also that in 1967, the prior year, as indicated on his 1040 for that year, Defendant's Exhibit F, he did not have any W-2 income. He did not have any salary income. (Transcript p. 568). Note, also that appellant was in complete control of the corporation. He determined what his own salary would be, and how much commission income he would make. Kolakowski's only interest was the $50 payments per house.

Accordingly, Droms, the appellant, who paid no salary to himself in the previous year, decided what his salary would be for the 1968 year. He then had a W-2 form prepared reflecting an income of only $6,600 to give to Ertel or Dennis to prepare his second financial statement, Government Exhibit 3, knowing full well the purpose of the new financial statement was to update his income data for the 1968 year, and knowing full well that his actual income was much greater than what was reflected on the W-2 form.

Note that the first offer was not rejected until February of 1969, and that DiSorbo had already computed the constructive commission income as of January 3, 1969, so that if appellant didn't already know what his income was it is clear that had he asked DiSorbo what his income was he would be told that it was much greater than $6,600, but he doesn't ask DiSorbo to tell him what his income for 1968 would be, although he clearly knows he will have this additional constructive income. Rather than do that he acquires a W-2 reflecting a salary of $6,600, although he paid no salary to himself in the previous year.

Accordingly, the understatement of income on the second financial statement, Government Exhibit 3, was done knowingly

and intentionally, being both deliberate and wilfull with the purpose of disguising his true income in order to induce the reliance of the Internal Revenue Service to accept his offer in compromise.

Additionally, with respect to the contention that the appellant would not have known his true income until April 15, 1969, and since he signed the second financial statement in late March or early April, 1969, not on April 28, 1969 as indicated on the Form 433, Government Exhibit 6, the discrepancy as to the understatement of income could not therefore be wilfull, (Transcript pp. 756-760), appears to be a patent fabrication when considered with Government Trial Exhibit 26, (Appellee's Appendix p. 96), introduced in rebuttal by Mr. Dennis. (Transcript pp. 789-790).

The appellant testified that he never met Mr. Dennis until the time of trial and never gave him any information, (Transcript p. 731-732), and testified that he never heard of Mr. Dennis or saw him until the trial, and that he only spoke to the secretary when he delivered his W-2 form. (Transcript pp. 765-766). And testified in response to the question put by his own attorney:

> "Q: Mr. Dennis said that he discussed this matter with you."
>
> "A: I told you before and I will tell you again a thousand times, I never met the gentleman until Thursday here in the hall . . ." Transcript p. 773.

Government Exhibit 26, is a copy of a letter dated April 25, 1969, from Mr. Dennis to the appellant, Mr. Droms, which reflects the initials of Mr. Dennis as the maker of the letter, and he testified that he signed it and gave it to his secretary with the other mail to be mailed. (Transcript p. 788). The body of the letter indicates that Mr. Dennis spoke to Mr. Droms by telephone on at least one occasion and that Mr. Dennis had made at least three other unsuccessful attempts by phone to

contact Mr. Droms. The letter also indicates that Mr. Droms had sent his W-2 form in by mail, and further indicates that the purpose of the letter was to secure the appellant's signature on the second financial statement, and pursuant to that purpose it requested that Mr. Droms stop in at Mr. Dennis' office on Monday or Tuesday of April 28 or 29 to sign the papers.

The letter makes it clear that the appellant had at least heard of Mr. Dennis before the time of trial. It makes it clear that he did in fact supply Mr. Dennis with at least some information used to prepare the second financial statement. It makes it clear that the appellant did not simply bring in a W-2 and briefly discuss its purpose with a secretary. It makes it clear that he did not sign a blank form or a form that was dated sometime after he signed it, and it further makes it clear that he did not sign the form in late March or early April of 1969, and indeed could not have signed the form prior to April 25, 1969, and most likely not until April 28, 1969, as reflected on Government Exhibit 3, and just as Mr. Dennis said was the fact.

The argument that because the letter doesn't say that there was a personal interview between Mr. Dennis and Mr. Droms that therefore it never occurred, which is raised on appeal was also raised on cross-examination at trial. (Transcript p. 792).

That argument was rejected by the jury, and in view of the fact that the letter reflects at least five erroneous statements made in the testimony of the appellant, and in view of the fact that the letter negates the argument that Mr. Dennis simply copied the prior financial statement and added the data from appellant's W-2, and in view of the fact that the letter negates the argument that the appellant did not know what his income was when he signed the second financial statement, which he testified he would know at least by April 15, 1969, and which he saw no reason to correct on April 28, 1969, although he testified that he knew the purpose of the new financial statement to be to obtain his income data for 1968; it is not surprising that the jury

would reject still another attack on the credibility of Mr. Dennis, when everything attacked previously had been substantiated in support of the testimony of Mr. Dennis.

In fact, with respect to credibility, the appellant's testimony is at variance with virtually all of the government witnesses, and accordingly, the inference is that the jury found the appellant to be unbelievable.

The appellant testified that Revenue Officer Atkinson called him into the office and told him that the Internal Revenue Service had assessed the $19,000 tax liability against his wife, and that he, the appellant, had asked that the debt be transferred over to him, because his wife was too nervous, and Atkinson informed him that if he, the appellant would sign for it, they could transfer the debt to him, and that this was how the debt became his obligation. (Transcript p. 669; 701-704).

Atkinson testified that he was assigned to evaluate the appellant's first offer in compromise in the Fall of 1968, (Transcript p. 157) and thereafter assigned to collect the account in September of 1970. (Transcript p. 167).

On cross examination he testified to the same effect, and further testified that he had no conferences or phone calls or communications with respect to any negotiation of this tax liability. (Transcript p. 209-210). He further testified that according to Government Exhibit 1, taxpayer delinquent account card, that appellant was held to be the responsible officer of the defunct corporation and that the assessment was made against him. (Transcript pp. 241-243).

Mr. Reis, testified that Government Exhibit 1, was the original tax delinquent account record, and that record assessed the penalty against the appellant, not his wife, and the date of that assessment was March 23, 1968. (Transcript pp. 75-79).

The record itself, Government Exhibit 1, (Appellee's Appendix pp. 22-23), reflects that the date of this assessment

against the corporation was apparently March 37, 1968, and the date of the assessment against the appellant was April 4, 1968, and notice that he had been personally assessed as the responsible officer of the corporation was sent to him the same date. This record also reflects that the matter was transferred to the Offer In Compromise branch on August 12, 1968, which is Atkinson's first contact with the case, according to the original record, and his next contact with the case is when it was assigned to him for collection in August of 1970. There is no mention of any assessment against the appellant's wife, and Mr. Atkinson was not assigned anything to do with the case until August of 1968 some four months after the assessment was made against the appellant, as President of that corporation.

Moreover, no questions as to this matter were directed to Mr. Atkinson on cross examination, which was not until the day he testified on direct. Transcript pp. 202-247).

The appellant testified that Martha Spoor could withdraw funds from the corporation's bank account. (Transcript p. 748). Yet, the corporation resolutions, Government Exhibit 16, (Appellee's Appendix pp. 88-89), reflected that the appellant was the only agent authorized to withdraw funds, and the bank representative testified that there were no further corporate resolutions changing the designation of the appellant as the only agent authorized to withdraw funds from the corporate account. (Transcript p. 419).

The appellant testified that he never paid Kolakowski $10,000 for the corporation, and that in effect Kolakowski was paying himself the $10,000 out of his own corporation, and that when he paid himself this amount he would then give the corporation to the appellant, and in fact did give it to the appellant. (Transcript pp. 712-717).

Although Kolakowski's testimony, *supra*., clearly indicated it was a sale. He testified he gave the appellant complete control of

the corporation in March of 1967, and the bank resolution, Government Exhibit 16, support that contention. Moreover, the formalized written agreement, Defense Exhibit E, (Appellee's Appendix pp. 97 & 98), clearly reflect a sale, and by the terms of the agreement as to when liability for claims against the corporation were shifted from Kolakowski to the appellant, points 3 and 4 of that agreement reflect that this occurred on March 1, 1967.

Moreover, Kolakowski always considered it a sale as reflected by Government Exhibit 15, his record of the "Payments on the Business from W. Baldwin Droms", (Appellee's Appendix pp. 83-87). And, according to Government Exhibit 10, the corporation disbursement record, the appellant also classified these $50 payments as "Payments on the Business." (Transcript pp. 717-719).

Appellant also testified that although he wasn't buying the corporation he was scared to death that after all the payments Kolakowski would not turn over the stock. (Transcript pp. 719-720).

There is further testimony by Kolakowski that the realty brokerage would get a commission of about 6% on the sale of a house which would be split 50-50 with the salesman giving the broker a 3% commission, and that these particular houses that were sold at that time sold for about $14,000. (Transcript pp. 351-352).

Mrs. Spoor testified to the same effect, and indicated that Kolakowski was the broker. (Transcript pp. 505-507). Spoor testified that to be listed as a broker with the realty board so as to sell properties listed with other agencies it was necessary to have your own agency, and that at this time Droms, the appellant, was not listed on the realty board, but Kolakowski was on the board, which was helpful to them in starting the business. (Transcript pp. 524-525).

The appellant testified to the same effect but insisted that Kolakowski was still in charge of the corporation. (Transcript pp. 712-714). Kolakowski, however, testified that he turned over the business completely except for holding on to the stock, and that he placed no restrictions on the appellant, nor did he take any commissions except for the agreed $50 on each house sold. The commissions were given to the corporation which appellant controlled. (Transcript pp. 381-382).

If Kolakowski were in fact in charge, and more than just the nominal broker for purposes of allowing the appellant to sell under his name since he was listed with the realty board and appellant was not, since his previous business had just folded, then Kolakowski would have been entitled to a commission of $420, at the rate of 3% on a $14,000 home, for every house sold, yet the fact is that he received only $50 per house for the first 200 houses to acquire the sum of $10,000. If he were the broker and in charge of this agency he would have been entitled to receive on the sale of these 200 houses, commissions in the neighborhood of $84,000 or about eight times the amount that he actually received. The facts would show that the rest of this broker's 3% commission or the $70,000 earned between March of 1967 and May of 1968 went to the corporation managed and controlled by the appellant who had the exclusive use of the corporation's bank account.

If the original agreement between Kolakowski and appellant were not a sales agreement, and if appellant were not at that time in full control of this corporation just as Kolakowski testified, then it would be simply incredible that Kolakowski would give the appellant some $70,000 in earned commissions as well as then giving appellant the corporation which had some $23,000 in its bank account.

The appellant further testified that he did not review his 1968 tax return, Government Exhibit 4, with the accountant,

DiSorbo, when he signed it and paid the tax on April 15, 1969, although he believed his income to be only $6,600 and his tax, the tax he paid on that date, according to the return, was $2,450, almost half of what he said he believed was his income, to support a family of six dependents. What is even more curious is that Government Exhibit 4, the appellant's personal income tax return, (Appellee's Appendix pp. 45), reflects that out of this total $1,450 in tax, $981 was withheld from his salary income and $1,469 was tax on additional income. Yet appellant made no inquiry as to this additional income, and additional tax, although he testified that, "in his heart", he believes that this salary income is all the income he had when he signed the financial statement. (Transcript pp. 753-760).

And, Government Exhibit 26, proves that he signed the second financial statement on April 28, 1969, shortly after he signed his tax return. And, by his own testimony he indicates he knew the purpose for the second financial statement to be to determine his income for the 1968 year.

Here, again, it is first not credible that a man supporting a family of six, who believes that all of his income is salary of $6,600, subject to withholding taxes is going to pay an additional $1,469 in taxes, without asking some questions as to how the accountant had determined that income. Unless, of course, he knows all along that he has more income than that salary income. Unless he knows all along about this constructive income. Unless he knows all along that he isn't simply a salaried employee. Unless he knows all along that everything made by that corporation and in that bank account is his to use for his own personal obligations, and well knows that he is in fact using the corporation's account for his own personal use. Unless he knows that he is both his own employer and his own employee.

No one, let alone someone with considerable business expertise is going to pay an additional $1,469 when he believes his

only income was $6,600 for which he had already paid the tax. In fact if that was all the income he had there is no possible way he could pay this additional tax. And, how did he pay this tax? He testified that he paid it out of the corporation. (Transcript p. 755).

According to his version of the facts, he paid it out of Kolakowski's money, and whether Kolakowski's or the corporation's it would be additional income to the appellant.

Here again, it is simply not credible that this salaried employee is simply going to write out a corporation check for $1,469 to pay his personal income tax, unless he knows and believes that he is, for all practical purposes, the corporation, unless he knows that the corporation is his and he owns it. And if he knows that, then certainly he knows his income is more than $6,600 of salary he paid to himself.

He knew it on April 28, 1969 when he signed the second financial statement. He knew it on April 15, 1969 when he signed his return for 1968. He knew it when he gave the W-2 form to Dennis, whenever that occurred. He knew it when he had the W-2 statement prepared. And he knew it ever since he acquired control of the corporation in March of 1967, and he knew it whenever he wrote out a corporation check to buy clothes, or pay his child's tuition, or to pay his taxes or to pay his home mortgage, because he well knows that none of that will be reflected in the salary income shown on the W-2 he used to show his income for 1968, for purposes of his second financial statement.

On redirect examination it was elicited from the appellant that on Government Trial Exhibits 7 and 8 the corporation income tax for the next two years, the years ending October 31, 1969 and October 31, 1970 on page 2 of those exhibits it lists Margaret Droms as the 100% stockholder of Prestige Realty of the Capital District (Appellee's Appendix pp. 64-74), and

appellant testifies that he does not know where the accountant would get this information, since he never transferred any stock to his wife. (Transcript pp. 768-769). Yet, the accountant who prepared those returns is the same Anthony DiSorbo who was the escrow agent on the sale of the stock to the appellant. DiSorbo would therefore know that the appellant was the 100% owner of the stock and the only reason DiSorbo would list appellant's wife as the 100% owner would be because the appellant told him to list her as the owner of the stock.

In every instance the appellant's testimony is unbelievable to the ordinary mind. The allegation against Mr. Atkinson proved to be factually untenable. The assertion that Martha Spoor could withdraw corporate funds proved to be factually false. The contention that Kolakowski was buying his own corporation from himself, with his own money in order to give it to the appellant, along with some $70,000 in commission, and the contention that appellant did not know he was buying the corporation, although he was making payments on the business, and using the corporation's money to pay his personal bills, and although he was scared to death that the stock would not be turned over, proved to be patently ridiculous. The contention that he believed in his heart that the $6,600 on his W-2 statement was all the income he had, when he knew he was using the corporate account for his own purposes, paid his own salary, and knew his actual income would be more, proved to be absurd when it is considered that he never questions DiSorbo about this additional income in April of 1969, but simply writes out a corporate check to pay it. The assertion that he gave no information to Dennis, and never even heard of him, and the assertion that he signed the second financial statement long before he signed his tax return, was proved utterly false by Government Exhibit 26, which fully supported the testimony of Dennis. And the supposition that DiSorbo, knowing that appellant owned the stock, simply for no apparent reason listed appellant's wife as the owner of the stock was simply untenable.

The final factual issue in the case is whether the appellant disposed of this asset, Prestige Realty of the Capital District Corporation after he acquired it November 1, 1968, and before he had the second financial statement prepared in early 1969.

The testimony of Agent Broadbent, *supra*., is that he acquired the stock transfer records of the corporation from the corporation's attorney and those records, Government Exhibits 12 and 13 show the transfer of stock from the Kolakowski's on November 1, 1968, and the third record, Government Exhibit 14 (Appellee's Appendix pp. 81), shows the transfer of the stock from the appellant to Martha Spoor on November 2, 1968.

Mrs. Spoor testifies that she is a real estate broker and works for both Prestige Reaity and Baldwin Droms Associates, and that she knows the appellant for about ten years. Previously she was a salesperson for Prestige Realty and a housewife before that time. She began at Prestige in 1967 when appellant took over its management. (Transcript pp. 504-505).

She further testifies that there came a time when she acquired the ownership of Prestige Realty, and being shown Government Exhibit 14, the stock transfer to her from the appellant, she testifies that she had seen it before and that it reflected that she owned the stock. And when asked if she still owned the stock she replies, "Yes". (Transcript pp. 507-508).

When asked what she paid for it, she responded that she thought it was about $3,500 which she had loaned to the appellant to start the business. (Transcript p. 508).

She testified, upon inquiry as to the source of these contributions that she had an oral agreement with the appellant that if she would help out in meeting the out of hand expenses of the business he would turn over the business to her when he acquired it from Kolakowski, and she further indicated that she was aware of the arrangement between the appellant and Kolakowski as to the fact that the appellant would acquire the

business when he paid Kolakowski the sum of $10,000 at the rate of $50 per house, the agency sold.

Pursuant to this agreement between her and the appellant she claims she made contributions or loans to the appellant by paying in part of her commission on houses she sold, for the out of hand expenses of the business, such as advertising and what not.

However, she could not be specific as to the amounts she paid at any one time and indicated it was never a large amount at any one time, except for a couple of hundred dollars on one or two occasions. She indicated that she never kept any records as to these contributions but estimated they could not have totaled more than $3,500 in all.

She further testified that most of these contributions were made in the first year of their operation, which would be March of 1967 to March of 1968, when the full $10,000 or most of it was paid to Kolakowski, since it is all paid in May of 1968. It was further established from her testimony that her commissions were dependent upon the sale of houses where she split the commission of 6% on each sale 50-50 with the agency.

Accordingly, as her ability to contribute to the running of the corporation increased, the corporation's need for such contributions decreased, since both were dependent on the sale of houses. When questioned as to how she was able to make these contributions in view of the fact that when her income reached the point where it would be possible to do so it would seem that such contributions would not be needed, she then testified that she had sold some property with her husband and had some money out of that transaction.

When asked how much she made in 1967 she could not answer but indicated that it was not very much. She further testified that her husband, who she said was running the house

at that time also had an income, and was providing for the support of the family.

When asked if their combined income was somewhat greater she replied, "I suppose, yes."

It was then brought out that when she testified before the grand jury she had indicated that she and her husband were separated at that time, and further that he made no alimony or support payments, and further that she was responsible for the support of her three children, at that time. (Transcript pp. 508-522).

She does indicate that the main source of these contributions were from her commissions from Prestige and when asked how she could contribute if neither she nor the corporation were making any money, she responded that it depended on how much money she had available. (Transcript pp. 520-521).

It was also established that in both 1967 and 1968 that Prestige Realty had about five other salespersons in addition to her and the appellant, so that all of the sales were not hers, and presumably not even half of the sales would be hers. (Transcript pp. 532-533).

Judging from Kolakowski's payment record, Government Exhibit 15, Appellee's Appendix pp 83-87, only four houses were sold in the first two months of the arrangement. At the rate of 6% on a $14,000 house split 50-50, the corporation would have roughly $1,600 at the end of those two months and if she sold all of those houses she would have an equal amount. However, if she is supporting herself and three children she is not likely to have more than a couple of hundred dollars left to contribute. In the third month seven houses were sold bringing the corporation's income up to about $4,400 at $400 a house, and in the fourth month 15 houses are sold, increasing the corporation's take to about $10,400, and it's certainly questionable now that the corporation is in any further need of

her contributions. In July of 1967, 13 houses are sold, in August 14, September 21, October 24, November 24, December 14, and at this point the corporation has receipts of over $50,000, so that her testimony as to these contributions she made is certainly dubious at best.

In fact, we know from Government Exhibit 23, (Appellee's Appendix p. 92), that the appellant in September of 1967 paid nearly $600 in school and property taxes on his residence out of the corporate account, and we know from Government Exhibit 24, (Appellee's Appendix p. 93), that in September of 1967 he paid $1,003 on his home mortgage out of the corporate account, which at that time according to the Kolakowski record had earnings of about $30,000.

Aside from the first 2 or 3 months, therefore it does not appear that there was any need for her contributions and it does not appear that she would have much to contribute in those first three months, and certainly she would not have $3,500 and especially not if she were supporting herself and three children.

Accordingly, her explanation as to how she acquired the corporation and as to what consideration she gave is highly questionable. Moreover, after she acquires the corporation pursuant to this oral agreement nothing changes in their arrangement. She makes no inquiry. She makes no more money. We know from Government Exhibits 23 and 24 that the appellant continues to use the corporate account for his own needs, and she continues to operate as an employee rather than like owner.

There is no question that the whole arrangement between her and the appellant as to her acquisition and ownership of the corporation appears to be a sham, and that for all practical purposes she never owned it, and he always owned it.

Yet she testifies that she owns it. And the stock transfer record of the corporation given to the government agent reflects that

she in fact owns it, having acquired it from the appellant on November 2, 1968.

At trial, however, for the first time, although she claims to own the corporation and says she has seen the stock certificate transferring the stock to her sometime before trial, she testifies that she never actually received the stock certificate, and in fact that it didn't matter to her whether Kolakowski or Droms, the appellant, or herself, was the owner of the stock. She testifies she does not recall ever seeing the certificate, although she earlier said she had seen it before. (Transcript p. 526).

The appellant thereafter testifies that he knew that he had at least an interest in this corporation by November 1, 1968 when Kolakowski transferred the stock to him, and when asked did he then transfer the stock to Spoor on November 2, 1968, he replies, "I signed it back to her, yes." When shown the stock certificate reflecting the transfer to Spoor, Government Exhibit 14, he indicates that it reflects that the transfer occurred on November 2, 1968, but when asked if that was the date Mrs. Spoor assumed ownership of the corporation, he replied, "Mrs. Spoor never saw that stock certificate." When asked if she owned it, he replied, "she didn't assume ownership of it, either." When asked if he signed it over to her, he replied, "What I'm trying to point out is, I'm saying that is exactly what it says there, that I signed it there, but it was never delivered to her." When asked if he intended to give it to her, he replied, "Well, let's put it this way, that if I had intended to give it to her, I would have gave it to her." When asked then what the transfer record meant, he replied,

> "When it was signed over to her, then there was a question — I brought it over to the accountant and the question was that I should — in fact, I didn't even consider whether Mike Kolakowski, giving that transfer over to me, was official because it wasn't entered into the corporate books, and that is why, one of the reasons that

> she — the stock was taken over to the accountant, and to be honest with you, that is the last I saw of it." (Transcript pp. 720-722).

The matter of entering the transfer in the corporation books has no substance, since Defense Exhibit E (Appellee's Appendix pp. 97 & 98), clearly shows that there is nothing further to be done to complete the sale and transfer of the stock to appellant, and that agreement reflects that the sellers would resign their positions as of December 15, 1968, so that appellant could have entered anything he wanted into the corporate records.

Moreover, if he never saw the stock certificate again, after he delivered it to the accountant, then it is not known how he knows that it was never given to Mrs. Spoor. It is also interesting and somewhat curious that the appellant testified that he had never seen the stock certificates transferring the stock from Mr. and Mrs. Kolakowski to him. (Transcript pp. 704-712). Although he does remember signing the transfer to Spoor.

When asked about the delivery to the accountant, the appellant, indicated that he took it to a Mr. Parisi, a few weeks later in November or December of 1968, and although he indicated that his reason for taking it to Parisi was to determine whether he owned it, he then says he never discussed it with Parisi, indicating "it got lost in the shuffle."

Curiously, he also says that it was the end of the fiscal year, and he says he took a lot of papers to discuss with Parisi, which he discussed with a subordinate and which he described as disbursements and receipts. However, we know that DiSorbo prepared both the corporate tax return and the appellant's personal tax return for that year, and appellant testified he didn't discuss either of them with DiSorbo, and therefore didn't know what his income was when he made out his second financial statement, but perhaps he discussed these matters with Parisi's subordinate. (Transcript pp. 723-724).

Thereafter when asked his purpose for assigning the stock to Spoor, he says his purpose was to transfer it to her, but says he didn't do it, because he wasn't sure he owned it, since it wasn't entered in the corporate records. (Transcript p. 724).

There was some confusion as to whether, Parisi the accountant was also Parisi the attorney from whom the government agent obtained the stock certificates, and it was ascertained that they were cousins, but occupied separate offices. Parisi the accountant was established to be the accountant for the corporation to whom the appellant went to for advice, and was described as "our accountant" which presumably means his and Mrs. Spoor's. Parisi the attorney was established to be Mr. DeLorenzo's partner, who appellant indicated was the attorney for the corporation, and Mr. DeLorenzo indicated that both he and attorney Parisi represented the corporation. (Transcript pp. 725-727).

Appellant testified that he brought the stock certificate to Parisi the accountant and never saw it again and accordingly does not know how Parisi the attorney acquired it, although we know he gave not only that certificate but the other two stock certificates to the government agent, which is curious since the appellant never saw them before. (Transcript pp. 727-729).

When asked directly if the reason he put the stock in Spoor's name was so that it wouldn't be in his name, he replied, "Are you saying that I'm trying to fraud the Government . . .?" Asked again, he replied that he put it in her name because she was "the backbone of the organization," and had lent him money to keep it going. When asked what was the purpose of putting it in her name if he wasn't going to give it to her, he replied that at the time he wrote it, he was going to give it to her, "but the fact is, I didn't give it to her." Repeating again that he took it to Parisi, because he didn't know if he owned it. But when asked if Kolakowski had anything further to do with the

corporation he replied, "I would have to say no." (Transcript pp. 737-739).

When asked again if he intended to give the stock to Spoor he replied that when he signed it he intended to give it to her. When asked if he ever intended not to give her the stock, he replied, "Well, let's say that she hasn't got it." It was elicited, however, that he intended to give it to her on November 2, 1968 and that he hadn't changed his mind as of January 1, 1969, since he didn't have the stock to make a decision about it, but he stated that within the past 5 or 6 years he may have intended not to give it to her. When asked if he intended to give it to her in April of 1969, he replied, "I can't say." (Transcript pp. 743-745).

When asked if Mrs. Spoor ever owned this co. ration, he replied, "As far as the stock transfer goes, giving her the stock, no." (Transcript p. 747).

It therefore appears from the testimony of Martha Spoor, the transferee, and the appellant, the transferor, that there never was a physical delivery of the stock certificate of the corporation, despite the avowed intention of the appellant to make the transfer, and despite the avowed belief of Mrs. Spoor that she in fact owned the corporation.

ARGUMENT

POINT I

The evidence was sufficient for conviction.

The government urged before the District Court, on the motion for judgment of acquittal at the close of the government's case, (Transcript pp. 645-646), and urges now that even if there had been no physical delivery of the stock certificate, and even if the law of the State were applicable so that there was no legal transfer of the asset, that it would make no difference, with respect to the indictment or with respect to the guilt or innocence of the appellant for the crime with which he was charged.

The indictment alleges that he willfully falsified Internal Revenue Service Form 433 a financial statement. The statute, Title 26, United States Code, Section 7206(1), would make it a crime if he subscribes this document and does not believe it to be true and correct as to every material matter. The form or document in question, Government Exhibit 3, the second financial statement, (Appellee's Appendix pp. 44), provides under Item 23, that the taxpayer must report the disposal of any asset, with a cost or value of $500, if disposed for less than its value from the time the tax deficiency arose until the financial statement is subscribed. Item 26 of that form, provides that the taxpayer must report any other assets he may own or any other assets that he may have an interest in, either actual or contingent, other than an asset listed somewhere else on the financial statement.

The proof as stated in the statement of facts shows beyond dispute that the appellant acquired this corporation or asset at a cost of $10,000 and indeed he admits he owns it at least by November 1, 1968. On October 31, 1968, the corporation's tax return, Government Exhibit 6, (Appellee's Appendix pp. 57-63) would show that as of that date the corporation had a net worth

of $28,680 and cash on hand of $23,581. (See Government Exhibit 22, Appellee's Appendix p. 91).

The question is whether he disposed of the asset prior to April of 1969, when he subscribed the second financial statement, and according to Item 23 of the form, he could dispose of it by sale, transfer, exchange, gift or in any other manner.

The indictment alleged that it was transferred due to the fact that the records of the corporation, produced by the attorney for the corporation, who is the law partner of the attorney who represents appellant at trial, pursuant to the Internal Revenue Service summons revealed that according to the corporation's records the stock was listed as being owned by Martha Spoor, and they indicated that the appellant had transferred the stock to her on November 2, 1968.

Had the records revealed that he had not transferred or otherwise disposed of the asset after he acquired it, then the appellant, would without doubt have been indicted for not reporting his ownership of this asset.

Accordingly, the testimony at trial that Spoor, the transferee, never received the certificate and that the appellant transferor never physically gave it to her, would prove, if true, that he always owned it after November 1, 1968, and therefore had falsified this form with respect to Item 26 of the form.

If we are talking about one asset then Item 23 and Item 26 are mutually exclusive, in that after acquiring it he either owned or he disposed of it, although arguably he could have disposed of it and still had an interest in it.

What the appellant has done was to lead the government to believe, prior to trial, that he had disposed of the asset, and then when the government rested its case, argue that he still owned it and never transferred it.

This tactic would seem to be clear from the way both he, the appellant, and Mrs. Spoor testified. It would also seem apparent

from the lack of any mention of the disposal of the asset aspect of the case in appellant's motion to dismiss the indictment prior to trial. Clearly, had this issue been raised then appellant could have been re-indicted charging that he failed to report his ownership of the asset. (Appellee's Appendix pp. 3-12, Appellant's Pre-Trial Motions.) Moreover, in the government's bill of particulars it was clearly specified as to when, how and to whom the asset was transferred so that the defense raised now would have been readily apparent then, particularly since both appellant and Spoor testified they owned the same corporation and the attorney representing appellant also represented the corporation. It would be odd in that close of a situation that the matter never came up for discussion.

Accordingly, under the rationale of *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, and *United States v. D'Anna*, 450 F.2d 1201 (2d Cir., 1971), the government should have been allowed a variance between the proof and the indictment, if the appellant, at trial wanted to contend that he still owned the asset. The variance in this case, assuming that appellant still owned the asset, certainly would not have prevented him from preparing his case. Indeed, had he been charged with owning the asset the argument that he transferred it would prevail. Nor would the variance here create any double jeopardy issue since it all pertains to the same single false document so a subsequent prosecution as to that document could not be brought. Accordingly, the appellant was certainly not misled as to the charge nor deprived of any constitutional protection. Indeed it was the prosecution that was misled.

The government contends that it is totally untenable as a proposition of law to argue that an individual charged with falsifying a document by telling lie A should be acquitted, not because he didn't lie, but because he told lie B, which also proves he falsified the document, when as in this case, if A is false B is true and if B is false then A is true.

The government contends that it should have been allowed to argue that the appellant could have been convicted whether the jury believed he owned the asset or whether they believed he disposed of it, since having acquired it he must have done one or the other with it, and in either case he falsified the document since he indicated on the document that he neither disposed of it or owned or had an interest in the asset, and surely it had to be one or the other.

The statement of facts makes it plain that the whole arrangement with Kolakowski, and Spoor, and using the corporation's account, and not giving accurate information to the accountants was all designed to conceal the fact that he had an asset or an interest in that asset or to conceal that he had assets or income with which he could pay this tax liability and other obligations he might have had as well. Any reading of this record should make that as obvious as stripes on a zebra.

The question of whether a physical delivery of stock was made in the context of this case where the transferor and transferee are so closely related as to be virtually in complicity, could only be answered by the appellant himself.

The government cannot know and does not know whether there was a transfer of stock from appellant to Mrs. Spoor on November 2, 1968 or at any time. If the testimony of appellant and Mrs. Spoor is credited then there was no physical delivery of stock from him to her. Moreover, their actions after November of 1968, into 1969 and 1970 would suggest that he still controlled the corporation and that she was still an employee. In addition, the fact that the 1969 and 1970 corporate returns, Government Exhibits 7 and 8, lists the appellant's wife as the 100% stockholder of the corporation would seem to indicate that he not only did not deliver the stock certificate but in fact never even endorsed it over to Mrs. Spoor on November 2, 1968. It suggests that he may have transferred the stock to his wife.

The point being that the government cannot know to a certainty what these parties did in fact. The government does know to a certainty that the appellant falsified the document regardless of whether he kept the asset or disposed of it, since it was proved beyond doubt that he acquired and owned it and indeed admitted ownership on November 1, 1968, although he himself testifies that he never received physical possession of the stock certificates from Mr. and Mrs. Kolakowski.

It is therefore submitted that even if the jury believed that he owned the asset as he testified and that there was no transfer of the asset they could and should have found him guilty of the charge of falsifying the financial statement, since no substantial rights of the appellant would have been prejudiced by such variance. *Berger v. United States, supra.*

However, the government believing that it was forced to prove the allegation made in the indictment endeavored to do so even though uncertain as to which of the two versions was in fact the truth. The question on appeal, however, as to the sufficiency of the proof, is whether there was sufficient proof from which the jury could have found that appellant had either understated his income or had failed to report the disposal of an asset which he had in fact disposed of within the terms of Item 23 of Form 433, Government Exhibit 3.

The standard to be applied on a motion for acquittal for insufficiency of the evidence is whether a reasonable mind could draw an inference from the evidence so that he might fairly conclude guilt beyond a reasonable doubt. In determining that motion the judge must give full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact. If the judge concludes that a reasonable mind might fairly conclude guilt beyond a reasonable doubt he should deny the motion. If he concludes that a reasonable mind could not fairly conclude guilt beyond a reasonable doubt the motion must be granted. If he concludes that either of the two results, a

reasonable doubt or no reasonable doubt is fairly possible, he must let the issue go to the jury. *United States v. DeGarmo*, 510 F.2d 1156, 1159 (2d Cir. 1975), *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972).

This standard applies to the trial court's inquiry whether the motion is made at the close of the government's case or at the close of all the evidence, but if after denial of the motion for acquittal at the end of the government's case, the defendant offers evidence, he waives any claim as to the sufficiency of that case alone, and the motion must be determined in view of all the evidence in the case. *United States v. Coblentz*, 453 F.2d 503, 506 (2d Cir. 1972).

On appeal the sufficiency of the evidence must be determined in light of the totality of the evidence, since one fact may gain color from others, and since there has been a conviction the facts and inferences to be drawn must be considered in the light most favorable to the government. *United States v. Tramunti*, 500 F. 2d 1334, 1338 (2d Cir. 1974).

Conviction in a criminal case by verdict of the jury must be sustained if there is any relevant evidence from which the jury could properly find or infer beyond a reasonable doubt, that the accused is guilty. *United States v. Glasser*, 443 F. 2d 994 (2d Cir. 1971).

The statement of facts clearly shows ample proof that the appellant understated his income on the second financial statement, Form 433, Government Exhibit 3, and indeed the issue as to the sufficiency of the evidence as to that aspect of the case is not raised on appeal. Accordingly, no further argument need be made here.

Again the statement of facts clearly proves that the appellant acquired ownership of the asset at least by November 1, 1968, where even according to his own testimony he concedes he owns

it, and further relates that he owned it in April of 1969, and further admits he did not report this ownership or interest on the second financial statement. (Transcript pp. 746-747).

The only issue is whether the proof was sufficient to show that the disposal of the asset took place before April of 1969. Now disposal under Item 23 of Form 433, Government Exhibit 3, would include any kind of disposal including a sale, exchange gift or transfer or any other manner of disposal.

The testimony of Revenue Officer Atkinson as to the purpose of that data clearly showed that it was material. The testimony of Kolakowski and Government Exhibit 15, showed the cost of the asset to be $10,000, and Government Exhibits 5; 6; and 22, showed it had a substantial value in excess of $10,000 in terms of its cash on hand and net worth which was some $28,000.00 on October 31, 1968, the day before appellant acquired it on November 1, 1968.

There is testimony by the appellant and Mrs. Spoor that they too had a sales agreement or a partnership arrangement whereby in consideration for the loans she would make he would transfer the corporation to her when he acquired it from Kolakowski. Accordingly, the jury could have concluded that there was a sale or exchange of the asset without reaching the technicality as to whether there was a transfer of stock under the State law, and as a legal proposition she may have had an enforceable contract right so as operate as a transfer as a matter of law.

However, in view of the fact that the District Court, pursuant to appellant's request to charge, specifically instructed the jury as to the applicability of Sections 8-309 and 8-313 of the Uniform Commercial Code (Transcript 899-901) the issue as to whether the transfer occurred will be considered in light of the constraints of that charge, since that is presumably the law the jury applied.

There was testimony, as indicated in the statement of facts, from the government agent investigating the case, Mr. Broadbent, that pursuant to a summons of the corporate records, the corporation's attorney supplied the three stock certificates, Government Exhibits 12, 13 and 14 showing the transfer of stock from the Kolakowskis to the appellant on November 1, 1968, and there was no doubt as to that fact occurring, although the appellant never apparently or according to his testimony ever received physical delivery or possession of that stock, but was nevertheless able to endorse the assignment of his stock over to Spoor on November 2, 1968.

Had neither Spoor nor the appellant testified it would be clear that the endorsed stock certificate, Government Exhibit 14, alone would be sufficient proof from which the jury might infer that the transfer had occurred on November 2, 1968, as indicated by the certificate.

The testimony of Broadbent as to where he obtained the certificate, that is, from the corporation's attorney, would further substantiate that inference, since the corporate records in the possession of the corporation's attorney would be presumptive evidence as to the legal sufficiency of the transfer reflected, including when that transfer occurred and the present ownership of the stock.

In rebuttal to those inferences is the testimony of the appellant; transferor, and the transferee, Mrs. Spoor, whose testimony indicates that physical delivery of the stock certificate from appellant to her never took place.

The crucial fact that the appellant neglects both at trial and on appeal is that the jury is not required to believe the testimony of any witness even if that testimony is uncontradicted. The Court in the instant case instructed the jury that it was not bound to take the evidence of any witness as true if it was believed that such witness was mistaken, untruthful, unreliable

or that the testimony was improbable. The Court further instructed that if they found from the evidence that a witness knowingly testified falsely to a material fact they could reject the entire testimony of such witness or reject part of it, and accept part of it. (Transcript p. 884).

As reflected in great detail in the statement of facts the testimony of the appellant proved to be materially false in a number of instances or if not false improbable and unreliable, so that his credibility was severely attacked.

The statement of facts also reflects that Mrs. Spoor was shown by her inconsistent testimony to be a hostile witness to the government and partial to the defense, so that her credibility was also at issue.

Moreover, her testimony is not credible in terms of ordinary common sense. She testifies that she has been in an intimate partnership business arrangement with the appellant for about 10 years. They work in the same corporation on a daily basis. She lends him or in effect gives him money, said to be about $3,500, in exchange for the corporation when he acquires it. Yet when he acquires it she never asks when will she get it, and he never tells her. If they are to be believed they never have any conversation about it. She purports to own the corporation and testifies she owns it, but yet, she doesn't know anything about anything. That story is not believable.

If the jury elected to disregard the testimony of both the appellant and Mrs. Spoor, then the inferences to be drawn from the fact of the endorsed certificate showing the transfer of November 2, 1968, and from the fact that it was produced as the corporation's record of ownership, would be sufficient proof of transfer to support the conviction under the State law definition.

Or the jury could have accepted their testimony in part. They could have accepted the testimony as to the agreement that he

would transfer the corporation to her when he acquired it, and then the stock certificate would be proof that that occurred.

Or they could have concluded from the fact of that agreement, and the fact that she claimed to own it, and the fact that he endorsed it on November 2, 1968, and the fact that he intended to give it to her on November 2, 1968, and the fact that he delivered the certificate to the corporation accountant, that there was in fact a constructive delivery to her through the accountant. The testimony of appellant reflects that the accountant Parisi was the corporation's accountant, referred to as "our" accountant which by inference means his and Spoor's. Appellant testifies that he goes to Parisi for advice in November or December of 1968, and to give him the corporate records, and he apparently leaves those records there, since he says the stock certificates got lost in the shuffle.

He testifies that when he went to Parisi with the certificate he intended to give it to Spoor, and the only reason he didn't give it to her was because he wasn't sure he owned it. If he asked Parisi if he owned it Parisi would have said that he did and then presumably he would give it to Spoor. But Parisi was not there so there was no discussion. After that time he never went back to discuss it either, since he testified that he never saw the certificate again.

If Parisi has the certificate what will he think it means? Appellant, according to the testimony, left the corporate records with Parisi who is now the corporation accountant. He works for the corporation. The corporate record, the stock certificate show that Mrs. Spoor owns the corporation. She thinks she owns the corporation. She thinks Parisi works for her. Parisi thinks he works for her. Appellant gave the certificate to Parisi when he intended to give it to her. She thinks he is her Agent, if she thinks she owns it as she says she does, and knows him to be her accountant to handle the affairs of her corporation. If Parisi has

the certificate he must believe he is her agent, since the certificate says she owns the corporation and he is the corporation's accountant.

And, accordingly, the jury might infer that Parisi as the corporation's accountant acted as the designated person or agent of whomever owned the corporation and that when appellant delivered the stock to him, fully intending to give it to Spoor, Parisi accepts it for Spoor thereby effecting a sufficient constructive delivery under Section 8-313(1)(a) of the Uniform Commercial Code. (See, Transcript pp. 869-871; Government's Summation as to Transfer of Stock).

It is therefore submitted that the evidence would allow the jury to either infer that there had been a constructive delivery of the stock certificate under the State law, or to infer that there had been an actual physical delivery of the stock to Spoor if they elected not to believe either the testimony of Spoor or the appellant as to that issue.

Under the applicable case law, cited *supra*., the government submits that the evidence was sufficient to sustain the conviction as to both the understatement of income and the failure to report the disposal of the asset.

POINT II

The Court did not err in denying the motion for judgment of acquittal.

In essence this is the same issue raised under Point I. If the evidence was sufficient to sustain the conviction then the denial of the motion for judgment of acquittal was not error.

The discussion of the motion at the conclusion of the government's case makes it clear that the trial court is applying the standard set forth in *United States v. Taylor*, 464 F.2d 240 (2d Cir. 1972), that he must give full play to the right of the jury to determine credibility, weigh the evidence, and draw inferences of fact. The Court points out that in reading the testimony of Mrs. Spoor he found sufficient inconsistency to raise the issue of her credibility for the jury, particularly since she was treated as a hostile witness by the government. (Transcript pp. 653-658).

As the government understands that ruling the District Court accepted rather than rejected appellant's argument that property rules fixing the incidents of ownership were to be decided by State law. The basis for denying the motion was the Court's conclusion that the jury might reasonably conclude either a reasonable doubt or no reasonable doubt based upon their judgment as to Martha Spoor's credibility, so that in adherence to the standard to be applied with such motions it presented an issue to be decied by the jury. *United States v. Taylor, supra.*

Of course, having presented evidence, the renewed motion must be reviewed in light of all the evidence in the case. *United States v. Coblentz*, 453 F.2d 503, 506 (2d Cir., 1972). And on appeal, the facts in evidence and the inferences to be drawn from such facts must be considered in the light most favorable to the government. *United States v. Tramunti*, 500 F.2d 1334, 1338 (2d Cir. 1974).

Accordingly, the government submits for the same reasons stated under POINT I that the Court did not err in denying the motion for judgment of acquittal.

POINT III

State law should not operate as a shield against enforcement of the federal criminal law.

As indicated under POINT II the Court accepted appellant's argument that the State law applied as to the legal incidents of property ownership.

The government would agree with that contention as a general proposition of law, but does not agree as to the extent of allowing the use of a State law to act as a shield to prevent the enforcement of a federal criminal statute.

In the situation presented by this case, appellant could argue that since there was no physical delivery of the stock that therefore he did not falsify the financial statement when he failed to report the disposal of the asset. On the other hand he can simultaneously argue that he did not falsify the financial statement by not reporting that he owned the asset because his intent was to dispose of it and by endorsing the certificate over to Spoor he can argue that he thought he had disposed of the asset, and therefore his failure to report that he owned it was not willful.

The government submits that the rationale of, *Ginsberg v. C.I.R.*, 305 F.2d 664 (2nd Cir. 1962), and *Wolder v. C.I.R.*, 493 F.2d 608, (2d Cir. 1974), which asserts that state law cannot operate to defeat the enforcement of the federal civil tax laws has equal application as to the obstruction of the federal criminal law.

Although the *Ginsberg* line of cases characterizes the collection of taxes as procedural for purposes of the *Erie*

Doctrine, so as not to disturb the traditional procedural-substantive determination as to whether federal or state law applies, it can also be argued that in effect these cases look beyond the form of the transaction under the substantive state law to determine the intent of the parties.

Similarly in the context of the instant case if it was the intent of the appellant to prevent prosecution by interposing the technicality of delivery under the State law to show that he still legally owned the asset, but nevertheless could not be held responsible for not reporting ownership since he intended to convey it then it ought to be permissible to hold him to answer for his expressed intent, where, as here, either intent would be sufficient to establish the crime.

On the facts of the instant case, according to appellant's testimony, he would have to believe he had transferred the asset when he prepared the financial statement so that when he failed to report the transfer he would have deliberately falsified the document. Unless he never intended the transfer, and if that be the case then the intent behind the making of the endorsement was to obstruct the prosecution of the crime. In either case it would be a criminal act, but since intent is seldom susceptible to direct proof it ought to be permissible to argue that if the expressed intent would be a crime under federal law except for the imposition of the mechanism of the State law, which prevents the intent from taking legal effect under the State law, but nevertheless would be a federal crime intentionally committed, then the State law should not be allowed as a shield to prevent enforcement of the federal criminal law.

The federal tax law does make provision for constructive ownership of stock under Title 26, United States Code, Section 544(a) which provides under subsection (1) that stock owned, directly or indirectly, by or for a partnership shall be considered as being owned proportionately by its partners, and under

subsection (2) provides that an individual shall be considered as owning the stock owned, directly or indirectly by or for his partner, and under subsection (3) provides that if any person has an option to acquire stock, such stock shall be considered as owned by such person, and under subsection (5) provides that stock constructively owned by a person shall be treated as actually owned by such person, and under subsection (6) provides that if stock may be considered as owned by an individual under either paragraph (2) or (3) it shall be considered as owned by him under paragraph (3).

Similar provisions are found in Title 26, U.S.C. 267(c)(1) and (3); Title 26 U.S.C. 318(a)(2)(A)(C) and (a)(4); and Title 26, U.S.C. 1563(e)(1) and (f)(3)(A).

In addition Title 26, U.S.C. 165(g)(2)(B) defines a security as a right to receive, a share of stock in a corporation. And Title 26 U.S.C. 425(c) defines a "Disposition" as including a sale, exchange, gift, or a transfer of legal title. Which is in conformity with the language contained under Item 23 of the Form 433, Government Exhibit 3, (Appellee's Appendix pp. 44), which asks the taxpayer to report any disposition of an asset by sale, transfer, exchange, gift or other disposition.

According to the testimony of Spoor and the appellant, that in exchange for her monetary contributions to get the business started he would transfer the stock to her when he acquired it, they were, if not in a formal partnership, joined in a joint venture to acquire this corporation.

Title 26, U.S.C. 7701(a)(2) defines a "partnership" to include a joint venture by means of which any business, financial operation, or venture is carried on and a "partner" includes any member of such joint venture.

Under the federal tax law it is therefore arguable that this joint venture is a partnership, and that when appellant acquired the stock on November 1, 1968 he does so for the partnership

and that she owns the stock that appellant owns, and pursuant to the terms of their joint venture agreement she has the option to acquire all of the stock, and the right to receive all of the stock, therefore, she would be considered the constructive owner of the stock by virtue of her option, and be treated as the actual owner of the stock.

The disposition of the asset would occur on November 1, 1968, by virtue of the sale or exchange of the stock for the $3,500 allegedly given as consideration, for an asset which cost $10,000 and had a value in terms of its net worth of about $28,000 at the time of disposition.

It is conceded, however, that the characterization of ownership under the tax law may not be applicable to the criminal law, although if it may be used in areas of tax avoidance it may also have some vitality in areas of tax evasion, and whereas this is not a tax evasion case the falsification of the financial statement to induce reliance in order to have the Internal Revenue Service accept a lesser amount of the tax liability then appellant could in fact pay would have the same effect as tax evasion.

Moreover, if the testimony of appellant and Spoor as to their arrangement is accepted then the characterization of that arrangement under the federal tax law as to constructive ownership of stock would give effect to their expressed intent for her to own the stock as soon as he acquired it. When he does, in fact, endorse the stock certificate over to her on November 2, 1968, then she has more than just an option to acquire the stock to show ownership, she has the right to receive it and the equitable ownership of the stock, so that she could have demanded delivery, and since it was endorsed to her a subsequent purchaser would have been put on notice as to her interest so that her right to the stock was secure whenever she elected to exercise that right.

Accordingly, even if legal title hadn't passed on November 2, 1968, the government pursuant to the definition of "disposition" under the federal tax law and the language of Item 23 of Form 433, ought to have been able to argue that a disposition by sale or exchange had occurred on November 2, 1968, regardless of whether legal title had passed.

In any event, the Court below, as evidenced by its instructions to the jury as to the application of Sections 8-309 and 8-313 of the Uniform Commercial Code, (Transcript pp. 899-902), accepted the contention that the State law was applicable. The thrust of appellant's argument here must be the same as in Points I and II, that the Court below should have decided as a matter of law that there had been no delivery of stock and no transfer and accordingly no disposition of the asset. Therefore, for the reasons stated by the government-appellee under Points I and II, the Court did not err in submitting the issue of delivery to the jury as a question of fact, with the instructions under the State law.

The government also contends, as argued on the motion below, (Transcript pp. 647-648), that by virtue of the joint venture-partnership arrangement between the appellant and Mrs. Spoor, that the appellant was acting as her agent when he acquired the stock from Kolakowski, so that there was arguably a constructive delivery of the stock to her under Section 8-313(1)(a) of the Uniform Commercial Code (U.C.C.).

In summation, pursuant to the instruction of the Court, the government argued that appellant with intent to deliver to Spoor did in fact deliver the endorsed certificate to the corporation's accountant, who as the agent of the corporation would hold the stock for whomever was reflected as the owner of the corporation which would have been Mrs. Spoor since appellant had simply left it with him with the other corporate records without any discussion in November or December of 1968. (Transcript

pp. 869-871). Arguing therefore a constructive delivery under Uniform Commercial Code 8-313(1)(a).

Looking elsewhere in the State law, and combining the inference that appellant is her agent under the joint venture and the accountant her agent as the custodian of the corporate records the government would contend that a stronger case for constructive delivery can be made.

The security is a specially endorsed security in registered form under Uniform Commercial Code 8-308. Appellant as endorser voluntarily transfers possession to the accountant at a time when by his testimony, in November or December of 1968 he has the expressed intent to deliver to Spoor, if the accountant verified he owned the stock. (Transcript pp. 744-45 and 724). thereby making a delivery under Uniform Commercial Code 1-201(14) to the accountant for the issurer corporation, the person on whose behalf the transfer books are maintained, under Uniform Commercial Code 8-201(3). Pursuant to the joint venture arrangement to transfer the stock to Spoor when he acquired it, appellant acts as her agent in presenting a security in registered form, specially endorsed to her, to the issuer, which by his silence indicates a request to register the transfer, under Uniform Commercial Code 8-401(1), imposing the duty upon the issuer to register the stock transfer.

The corporation accountant, Parisi, as agent assumes the status of issuer's agent to register the stock transfer under Uniform Commercial Code 8-406(1), and is under the duty to exercise good faith and due diligence in performing his functions to the owner of the security. Notice to the agent is also notice to the issuer of the agent's functions under subsection (2), including notice to appellant as issuer under 8-201(1) (a), as well as the corporation.

Taking the specially endorsed security in registered form to the agent of the corporation issuer and leaving it there with the

other corporate records, would constitute reasonable steps by the appellant to inform the corporation issuer's agent of the desired transaction to register the transfer of stock, and the agent would receive sufficient notice when delivered to his place of business, under UCC 1-201 (26), and under (25), have such notice, if from the facts and circumstances known to him at that time he would have reason to know.

Having received the security from appellant known as the manager of the corporation, and apparently familiar with the acquisition from Kolakowski since appellant testifies he seeks Parisi's advice as to that matter beginning in May of 1968, when the payments are completed, (Transcript p. 739) the agent would have reason to know that the transfer was properly, genuinely and effectively endorsed, since it was appellant's endorsement and he delivered it. Knowing the Kolakowski transfer and that is the third transfer he would perceive no reason to inquire as to adverse claims, and would presume Spoor to be a bona fide purchaser because of the close business relationship between her and appellant, and because he delivered it.

Pursuant to his duty to register the transfer under U.C.C. 8-401(1) and 8-406(1), he would then do so, without inquiry since no restriction by the issuer was imposed under U.C.C. 8-204. The testimony reflects that after leaving it with the accountant, appellant never saw it again. (Transcript p. 727). Therefore, the accountant agent, as the keeper of the corporation records, must have retained it as the corporate record reflecting the record owner of the stock and the corporation. Moreover since no one else ever saw it he must have given it to the corporation attorneys, Parisi and DeLorenzo, indicating that Spoor was the owner of the stock, since the lack of physical delivery came as a complete surprise to the corporation attorney at trial. (Transcript p. 637).

Since these were the only stock records produced by the corporation attorney pursuant to the Internal Revenue Service summons they must be the only stock transfer record, and they reflect the transfer to Spoor. The corporation accountant would therefore perceive her as the owner of stock and the corporation, pursuant to his duty under U.C.C. 8-406(1).

Both the corporation and the joint venture interest of appellant and Spoor would be organizations under U.C.C. 1-201(28), and would receive effective knowledge of the notice that the stock had been transferred to Spoor when the accountant learned it was to be transferred or from the time they, (the corporation and the joint venture), would have known it had they exercised due diligence under U.C.C. 1-201(27), which rule would not require the accountant to communicate to them that it had been done since he would have no reason to know, in view of the lack of restriction under 8-204, that communication of such knowledge would materially affect the transaction.

Accordingly, the corporation accountant, as the corporate agent, and custodian of its records, including the stock records was the custodian of the security for the record-owner Mrs. Spoor, and received constructive delivery of the stock certificate for her from the appellant joint-venturer.

As the agent of the corporation he became her designee to acquire possession of the security under the provisions of U.C.C. 8-313(1) (a).

It is therefore submitted that the jury could have, and apparently did, draw the inference, under the State law that a constructive delivery had been made as argued in summation, and as argued here, that inference would be legally permissible. However, as previously noted the jury could have disregarded the testimony that there had not been a physical delivery of the stock to Spoor on the issue of their credibility.

POINT IV

The Court's instruction as to submitting both alleged materially false items to the jury for consideration together was not error.

With respect to this issue the record reflects that at the conclusion of the arguments on the motion for judgment of acquittal at the close of the government's case, the court took up the matter of requests to charge. (Transcript pp. 659-661).

Thereafter, the particular charge complained of on appeal was discussed, which would be the government's fourth request to charge, and the record reflects that no objection was made to the charge. (Transcript pp. 665-666).

The particular charge as given appears at pp. 902-904 of the record and basically charges that the jury need not find that the appellant had wilfully falsified both alleged material false statements, but that if they all found that he had wilfully falsified the same material false statement they could then find him guilty of wilfully falsifying the document.

Prior to summations, there was further discussion of the charges and no objection was made, (Transcript pp. 809-810) and after the charge, no objection was made. (Transcript p. 904).

Rule 30 of the Federal Rules of Criminal Procedure, Title 18 of the United States Code, would preclude the assignment of error as to any portion of the charge unless objection is made stating distinctly the matter which is objectionable and the grounds for objection, before the jury retires to consider the verdict.

Accordingly, failure to object precludes review on appeal unless the instruction constitutes plain error affecting the substantial rights of the appellant. *United States v. Valdes*, 417 F.2d 335, 339 (2d Cir. 1969), cert. den. 90 S.Ct. 2206, 399 U.S. 912.

Appellee's statement of facts makes it clear that the allegations made with respect to the testimony of accountants DiSorbo and Dennis have no substance, and as for the great burden upon the jury in deciding the case, the record indicates that they retired for deliberation at 12:25 p.m. and returned at 2:15 p.m., (Appellee's Appendix, p. 99, Trial Minutes).

It would therefore be difficult to argue that the jury was confused or had a great burden in resolving the issues.

The argument that the indictment should have been in two counts, is untenable. The indictment charges that the form, the financial statement was falsified, and specified the material false statements. There could have been ten or more such statements but it would hardly be arguable that an individual could be convicted of ten felonies for falsifying one form. The indictment as charged is not duplicitous but by charging multiple counts it would have been multiplicious requiring an election as to which count to prosecute.

Perhaps requesting a special verdict as to each material falsehood would have been the better procedure, but the record indicates the charges were submitted prior to the issue being raised. In any event, the charge as given does not prejudice any substantial right of the defendant. The statute provides that if the document is wilfully falsified as to any material matter it violates the law, and accordingly, the charge was proper, and failure to object precludes review on appeal.

CONCLUSION

Accordingly, it is respectfully submitted that the Judgment of Conviction, appealed from, should be affirmed.

Respectfully submitted,

PAUL V. FRENCH
UNITED STATES ATTORNEY

BY:

THOMAS P. O'SULLIVAN
ASSISTANT U.S. ATTORNEY

Affidavit of Service

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Johnson D. Hay, Publisher
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The Daily Record

December 20, 1976

Re: United State of America vs. W. Baldwin Droms

State of New York)
County of Monroe) ss.:
City of Rochester)

Johnson D. Hay

Being duly sworn, deposes and says: That he is associated with The Daily Record Corporation of Rochester, New York, and is over twenty-one years of age.

That at the request of

Paul V. French, Untied State Attorney

Attorney for
Appellee

On December 20, 1976 (2)

(s)he personally served three (3) copies of the printed ☐ Record ☒ Brief ☐ Appendix of the above entitled case addressed to

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☒ By depositing true copies of the same securely wrapped in a postpaid wrapper in a Post Office maintained by the United States Government in the City of Rochester, New York.

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John D. Hay

Sworn to before me this 20th day of December, 1976

Notary Public
~~Commissioner of Deeds~~